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No. ——

In The
Supreme Court of the United States

October Term, 1994

ANDERS MIGDALECK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND APPENDICES

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QUESTION PRESENTED

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN HOLDING THAT THE DISTRICT COURT'S IMPROPER DEFINITION OF "REASONABLE DOUBT" IN ITS JURY INSTRUCTIONS WITH RESPECT TO ACCOMPLICE TESTIMONY DID NOT REQUIRE VACATION OF HIS SENTENCE UNDER 28 U.S.C. § 2255 IN LIGHT OF *SULLIVAN* v. *LOUISIANA*, — U.S. —, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993).

LIST OF ALL PARTIES IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ANDERS MIGDALECK,
Petitioner-Appellant

-vs-

UNITED STATES OF AMERICA,
Respondent-Appellee

No: 93-2604

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

LIST OF ALL PARTIES IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT:

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN HOLDING THAT THE DISTRICT COURT'S IMPROPER DEFINITION OF "REASONABLE DOUBT" IN ITS JURY INSTRUCTIONS WITH RESPECT TO ACCOMPLICE TESTIMONY DID NOT REQUIRE VACATION OF HIS SENTENCE UNDER 28 U.S.C. § 2255 IN LIGHT OF *SULLIVAN* v. *LOUISIANA*, ___ U.S. ___, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993) 19

A. Introduction 19

B. The Sixth Circuit's Ruling 19

C. Analysis 21

D. Retroactivity of *Sullivan* v. *Louisiana* 28

CONCLUSION 30

APPENDICES:

Appendix A – OPINION (U.S. Court of Appeals for the Sixth Circuit) *Affirming the Conviction of Petitioner Herein from the United States District Court for the Eastern District of Michigan, Southern Division* A-1

PAGE

Appendix B – ORDER DENYING MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255 (U.S. District Court for the Eastern District Of Michigan; Honorable Horace Gilmore) B-1

Appendix C – OPINION (U.S. Court of Appeals for the Sixth Circuit) *Affirming the District Court's Judgment that Petitioner is Not Entitled to Relief Under 28 U.S.C. § 2255* C-1

TABLE OF AUTHORITIES

CASES:

Arizona v. *Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) 25

Bollenbach v. *United States*, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946) 27

Cage v. *Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) (*per curiam*) 24, 30

Carpenters v. *United States*, 330 U.S. 395, 67 S.Ct. 775, 91 L.Ed. 973 (1947) 21

Chapman v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 24, 27, 30

Cool v. *United States*, 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972) 19, 20, 21, 22, 24, 25, 26

Cupp v. *Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973) 25, 26

Duncan v. *Louisiana*, 391 U.S. 145, 38 S.Ct. 1444, 20 L.Ed.2d 491 (1968) 21

Francis v. *Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) 27

PAGE

Gagne v. *Meachum*, 406 F. Supp. 1213 (D. Mass. 1978), *aff'd*, 602 F.2d 471, *cert. denied*, 100 S. Ct. 524, 444 U.S. 992, 62 L.Ed.2d 422 26

In re Winship, 397 U.S. 358, 90 S.Ct. 179, 24 L.Ed.2d 160 (1970) 21

Mackey v. *United States*, 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) 28, 29

Peck v. *Kemp*, 784 F.2d 1479 (11th Cir. 1986), *cert. denied*, 100 S. Ct. 737, 44 U.S. 1047, 62 L.Ed2d 733, *reh denied*, 107 S.Ct. 912, 93 L.Ed.2d 862 26

Sandstrom v. *Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) 27

Sparf and Hanson v. *United States*, 156 U.S. 51, 15 S.Ct. 273, 39 L.Ed. 343 (1895) 21

Sullivan v. *Louisiana*, ___ U.S. ___, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) ... 1, 4, 18, 19, 24, 25, 26, 28, 29, 30

Teague v. *Lane*, 489 U.S. 288, 109 S.Ct. 1061, 103 L.Ed.2d 334 (1989) 28, 29

United States v. *Colon-Pagan*, 1 F.3d 80 (1st Cir. 1993) 28

United States v. *Martin Linen Supply Co.*, 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) 21

United States v. *Stulga*, 531 F.2d 1377 (6th Cir. 1976), *after remand*, 584 F.2d 142 (6th Cir. 1978) 19, 20, 21, 22, 23, 24, 26, 28

STATUTES:

18 U.S.C. § 1341 5

18 U.S.C. § 2134 3

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2255 ..... 1, 2, 4, 5, 19

PAGE

RULES:

Fed.R.Crim.P. 52 ..... 3, 23

Fed.R.Crim.P. 52(a) 24

Fed.R.Crim.P. 52(b) 4

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Devitt and Blackmar, *Federal Jury Practice and Instructions*, 3d ed. § 17.06 (1977) 16-17

U.S. Const., Am. VI 1

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ANDERS MIGDALECK, by his attorney, RICHARD M. LUSTIG, petitions herein for a Writ of Certiorari to review the decision rendered in the Untied States Court of Appeals for the Sixth Circuit denying Petitioner's Appeal from the Memorandum and Order of the United States District Court for the Eastern District of Michigan denying Petitioner's Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255 and *Sullivan* v. *Louisiana*, ___ U.S. ___, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, filed August 29, 1994, affirming the District Court's denial of Petitioner's Motion to Vacate Sentence is reprinted in full as Appendix C. The Opinion of the Sixth Circuit has not been recommended for full text publication.

JURISDICTION

The Opinion and decision appealed from was filed and entered on August 29, 1994, by the United States Court of Appeals for the Sixth Circuit. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES

U.S. Const., Am. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Statutory provision herein involved is 28 U.S.C. § 2255, which provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to improve such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and made findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a

final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, my mother, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

The Federal Rule of Criminal Procedure involved herein is Fed.R.Crim.P. 52, which states:

(a) **Harmless Error.** Any error, defect,irregularity or variance which does not affect substantial rights shall be disregarded.

(b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

A. Prior Proceedings

On January 6, 1988, Petitioner-Appellant, ANDERS MIGDALECK, ("Petitioner"), and numerous other individuals were charged with nineteen counts of Mail Fraud, contrary to 18 U.S.C. 1341, and four counts of Interstate Transportation of Securities Taken by Fraud, contrary to 18 U.S.C. 2134. The Indictment alleged that defendants engaged in schemes to defraud insurance companies by filing insurance claims for damages caused by eight arson fires in the Detroit Metropolitan area, which defendants allegedly procured.

The Indictment alleged that Petitioner was the primary facilitator of the schemes to defraud. It contended that Petitioner paid the three arsonists who set the fires, Al Meredith, Jr., Adar Hasson, Willie Weems, and the "programmer" Al

Meredith, Sr., who arranged for the fires to be set, and the homeowners who allowed their homes to be burned. (TR, pp 3-75).[1]

On June 15, 1988, following a jury trial before United States District Court Judge Horace Gilmore, Petitioner was found guilty of ten counts of Mail Fraud. He was acquitted on the remaining nine Mail Fraud counts, as well as on all of the four interstate transportation of securities counts.

On September 9, 1988, Petitioner was sentenced to 20 years imprisonment, and ordered to pay $171,127.00 in fines and restitution.

Petitioner appealed his conviction and sentence to the Sixth Circuit Court of Appeals, which affirmed on March 7, 1990. (Appendix A). On appeal, Petitioner claimed that the trial court reversibly erred in failing to instruct the jury on evaluating the exculpatory testimony offered by the government witnesses. The Sixth Circuit ruled that, because there was no understandable request for such an instruction, no plain error occurred under Fed.R.Crim.P. 52(b). The Court further found that no miscarriage of justice resulted from the trial court's failure to instruct *sua sponte* on the manner in which the jury should evaluate the exculpatory accomplice testimony.

Following the affirmance of his conviction in 1990, Petitioner filed a Motion to Vacate Sentence under 28 U.S.C. § 2255 and requested a new trial in the United States District Court for the Eastern District of Michigan. This motion was based upon the United States Supreme Court decision of *Sullivan* v. *Louisiana*, ___ U.S. ___, 113 S.Ct. 2078, 124 L.Ed.2d

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1 **Anita Vianueva Sackett, a licensed public adjuster, was charged as an active participant in the Indictment. Ms. Sackett operated the Damon Adjusting Company which negotiated and submitted insurance claims to insurance companies on behalf of various homeowners. Prior to trial, Ms. Sackett pled guilty to Counts V and VI of the Indictment, in exchange for an agreement that if she testified against Petitioner, her incarceration would be no greater than eighteen months. (TR 797-799).**

182 (1993), which holds that a jury instruction providing a constitutionally inadequate definition of reasonable doubt can never be harmless error because it might allow the jury to convict without finding guilt beyond a reasonable doubt.

In an Opinion and Order dated December 16, 1993, Judge Horace Gilmore denied Petitioner's Motion to Vacate Sentence under 28 U.S.C. § 2255. (Appendix B). The court rejected Petitioner's contention that he was entitled to relief under the decision in *Sullivan, supra*, finding that the jury instructions, taken as a whole, were not constitutionally defective. (Opinion, 12-16-93, B-5).

Thereafter, Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, again arguing that the Supreme Court's decision in *Sullivan* mandates a finding that a miscarriage of justice occurred, and that the Sixth Amendment requires that he be granted a new trial.

In an Opinion and Order filed August 29, 1994, the Sixth Circuit found that:

> Based on the jury instructions as a whole, and this portion of them in particular, we conclude that the district court correctly described the government's burden of proof, and that *Sullivan*, which involved a further qualitative, "grave uncertainty"/"substantial doubt" definition of reasonable doubt, is thus inapplicable to the facts of this case. Accordingly, this Court's previous plain error analysis remains valid, and we do not reach the question of whether *Sullivan* has retroactive effect. (Opinion, 8-29-94, C-3).

Now, Petitioner respectfully requests that this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

B. Facts

Petitioner was convicted of ten counts of Mail Fraud, contrary to 18 U.S.C. § 1341. (R. 138 Judgment of Probation/Commitment Order). These ten counts were based upon alleged

schemes to defraud and obtain money from property insurers by means of false, fraudulent pretenses and representations in filing insurance claims, with respect to four separate residential dwellings damaged by arson fires.

The Indictment (R. 1: Indictment) alleged generally that Petitioner operated businesses known as Town and Country Builders and Anders Construction Company. During trial, the government relied primarily on the testimony of an unindicted co-conspirator, Albert Meredith, Sr. ("Meredith"),[2] to demonstrate Petitioner's knowledge that the fires were arsons, and his intent to knowingly advance the alleged schemes to defraud the insurers.

During trial, counsel for Petitioner attempted, through cross-examination and often times using the direct examination of counsel for the government, to impeach Meredith's testimony. Every statement Meredith made which tended to inculpate the Petitioner was contradicted by *three other informant witnesses* called to testify by the government during its case-in-chief.[3] In fact, none of Meredith's testimony relating to Petitioner's purported "intentional and knowing" involvement was corroborated by **any** of the government's other witnesses. Each of these three accomplices, Albert Meredith, Jr., Willie Weems and Adar Hasson, completely exculpated Petitioner from any wrongdoing.

Meredith claimed he had been in the fire repair business for 25 years, primarily soliciting fires and selling them to fire repair contractors. (Meredith, Sr., TR 5). He began working in 1981 or 1982 for Town and Country Builders, soliciting fire

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2 Meredith, by his own admission, was a convicted arsonist, who had committed between 500 and 700 arsons. He was still incarcerated at the time of Defendant's trial and testified pursuant to an agreement immunizing him from prosecution for any other arsons, disclosed by him to the federal government in the course of its investigation.

3 These informants were also convicted arsonists and unindicted co-conspirators involved in the commission of the arson fires alleged in the Indictment.

repair work and performing other duties, and he was paid by Petitioner based upon commission. (Meredith, Sr, TR 5-7).

At the time of trial Meredith was incarcerated, having served 3 years of a 4 to 10 year prison term for arson convictions on at least three different cases. (Meredith, Sr. TR 4). He cooperated with federal authorities only after federal agents advised him that he could be incarcerated for further arsons under their investigation, and that his son (Albert Meredith, Jr.) was giving information to the authorities. Meredith was promised immunity from prosecution for any arsons disclosed in his debriefing. (Meredith, Sr. TR 184-185; 272). He also received between $2,000 and $3,000 from federal authorities during his incarceration. (Meredith, Sr. TR 191). Meredith admitted involvement in as many as 700 arsons, but claimed that he never became personally involved in arsons due to his high level of integrity. (Meredith, Sr. TR 154-157).

Meredith testified that on a number of occasions, acting on behalf of one or more of the three arsonists, Albert Meredith, Jr., Adar Hassan and Willie Weems, he obtained funds from Petitioner so that each arsonist could purchase the materials necessary for the commission of the arson and/or drugs. In each such instance, Meredith stated that he approached Petitioner in his office for funds, but there were no witnesses to the exchange.

In contrast, each of the three other arsonists called to testify by the government, unequivocally contradicted Meredith's testimony that Petitioner provided funds to purchase materials to commit any arson, with respect to each count in the Indictment. (R. 1: Indictment) These counts will be reviewed, *infra*.

Count I and Count II

Petitioner was acquitted of Counts I and II, alleging mail fraud and interstate transportation of securities taken by fraud, pertaining to an arson fire at 17245 Westbrook, Detroit, Michigan a residential dwelling owned by Defendant Donald J. McQueen. The Indictment charged that Meredith's son, Albert Meredith, Jr., was the arsonist who set the fire.

With respect to Petitioner's alleged participation in this particular fire, Meredith testified:

> Q. (By Asst. United States Attorney Mr. Soisson): Go ahead.
>
> A. My son came to me and told me he had a fire on Westbrook and he needed some money in order to purchase the material.
>
> Q. And what did you do?
>
> A. And I tried to find out as much as I could about it and I found out he really had a fire. I went in the back and told Mr. Migdaleck that I needed some cash money to give Butch, Butch is the same as Al Meredith, Jr., so he could purchase some material for some liquids that he could burn the house down . . . .
>
> Q. When you approached Mr. Migdaleck about some money for your son to buy liquids for the fire, did he say anything? Did he do anything?
>
> A. He reached in his pocket and give me cash.
>
> Q. About how much?
>
> A. Let's see, I think, they normally ask for 50 or 20, the exact amount I can't remember. There is no sense of me telling you, but it usually runs from 20 to 50 to 100 depending on how pressed they are.
>
> Q. And what is the money for?
>
> A. Well, they would spend may [*sic*] $15 or $16 for the equipment and they would spend another 25 to 30 to buy some drugs.

In contrast, Albert Meredith, Jr., testified that the source of funds for the incendiary materials was *not Petitioner, but was Meredith, his father:*

> Q. (By Mr. Howard): And did your father give you any money for material to start that (Westbrook) fire?

A. Yes.

Q. And when did he give it to you in relation to the fire?

A. It was the same day of the fire.

Q. And where was he when he gave you the money?

A. In his office.

Q. And where was his office located then?

A. Within Town and Country buildings.

Q. Was he in the same office, that is enclosed office as Anders Migdaleck, or in another office?

A. He was in another office.

Q. How much money did he give you that day in connection with the Westbrook fire?

A. It was about $10 . . .

Q. Was he seated behind his desk?

A. Yes.

Q. And what did he do when you asked him for the $10?

A. He reached in his pocket and gave it to me.

Q. Before he gave you the money, did he leave the office at all, yes or no?

A. No.

Q. Did he ever tell you that he had to go someplace in order to get the money to give it to you?

A. No.

Q. Did he ever tell you that he was going to see Andy (Defendant) to get some money so that, to get money from Andy so that you could have material to burn the house?

A. No.

Q. What would happen if Andy knew that the fire was going to be an arson?

A. My relationship with him would have been destroyed as far as — it would have hurt me financially.

Q. Would Andy have bought the contract and paid the commission on it, that is what I am asking you, sir?

A. No. (Meredith, Jr.; TR 404-406).

Counts III and IV

Petitioner was convicted of Counts III and IV, (R. 138: Judgment of Probation/Commitment Order) of alleging two acts of mail fraud, regarding a purported scheme to defraud an insurer with respect to an arson fire at 18331 Greydale, Detroit, Michigan, owned by co-defendant, Ronald Pitts, who pled guilty prior to trial. This fire was started by Albert Meredith, Jr. in the presence of co-defendant, Donald McQueen. (Meredith, Jr.; TR 371-373).

Meredith claimed his son advised him of his intention to set a fire at the Greydale residence. (Meredith, Sr.; TR 32) He stated that he then "went and got 20 bucks from Andy (Petitioner) to give to Junior so he could set the house on fire." (Meredith, Sr.; TR 32). To his knowledge, his son then set the fire. (Meredith, Sr.; TR 32).

Albert Meredith, Jr., again testified directly contrary to his father's testimony on this key point:

Q. (By Mr. Howard): Now, the next fire you talked about was on Greydale?

A. Yes.

Q. And did you get any money from your father for that fire?

A. *No, I didn't.*

Q. Did you already have the money for the material or did someone else give it to you, if you can remember?

A. No. Sometimes I did have a little change, it didn't take that much to buy a bottle of alcohol.

Q. I am sorry. How much would a bottle of alcohol cost?

A. Shoot. 98 cents, maybe a dollar, something like that there. (Meredith, Jr.; TR 406).

Counts V through IX

Petitioner was convicted of Counts V through IX (R. 138: Judgment of Probation/Commitment Order), alleging five separate acts of mail fraud with respect to an arson fire at 14992 Ferguson, Detroit, Michigan, a house owned by co-defendant, Michael White. Again an irreconcilable conflict arose regarding Petitioner's alleged involvement as well as a conflict in the testimony regarding the identity of the individuals who actually set the fire.

Meredith testified that after he learned that co-defendants Michael White and Willie Weems intended to burn White's dwelling, he "went back to the back office and told Mr. Migdaleck that Michael wanted to burn his own house. I think we made a joke out of it. He said he needs some money, he was speaking, he is Michael White, and Willie Weems would need money in order to burn it." (Meredith, Sr.; TR 34). Meredith claimed that he then obtained $50 to $100 in cash from Petitioner and gave it to Willie Weems so he could purchase materials to burn the house, and the fire occurred that night. (Meredith, Sr.; TR 34-35). Meredith emphatically denied that he went to the Ferguson dwelling prior to the fire, stating that he only went there after the fire. (Meredith, Sr.; TR 35).

William Weems, one of the three arsonists called by the government at trial, related a very different version of events. Weems recalled that he first met Meredith and co-defendant Michael White at the Town and Country offices in order to

plan the fire at White's residence. (Weems; TR 529-530). Weems and Meredith drove to a store within the Southfield/ Grand River Shopping Center, and Meredith purchased some liquid material, probably rubbing alcohol, to start the fire at White's residence. (Weems; TR 532-533). Weems was then transported to White's residence by Meredith, who waited outside while Weems started the fire. (Weems; TR 537). Thereafter, Meredith and Weems circled the area in Meredith's vehicle, and returning approximately 15 minutes later, checked the progress of the fire. (Weems; TR 536-537).

Thus, not only did Weems totally discredit Meredith's claims regarding the Petitioner's alleged participation, but Weems also demonstrated that Meredith, contrary to his representations at trial, was directly involved in the commission of arson fires.

Counts X, XI and XII

Petitioner was acquitted of Counts X, XI and XII, alleging one charge of mail fraud and two charges of interstate transportation of security taken by fraud, in connection with an arson fire at the residence owned by co-defendant, Pamela Hatter Williams, at 18335 Faust, Detroit, Michigan. The Indictment (R. 1: Indictment) alleged that arrangements for the fire were made by Willie Weems, co-defendant Michael White, and the homeowner.

Meredith did not testify as to the source of funds for the fire started at the Faust address, the only fire alleged with respect to which he did not give such testimony. (Meredith, Sr.; TR 41-47). Willie Weems admitted that he and co-defendant White purchased the materials for starting the fire, a mixture of lacquer thinner and charcoal lighter fluid, with funds provided by co-defendant White. (Weems; TR 546-547).

Counts XIII and XIV

Petitioner was convicted of Counts XIII and XIV (R. 138: Judgment of Probation/Commitment Order), which alleged two acts of mail fraud with respect to an arson fire at 613 Fildew, Pontiac, Michigan, a residence owned by co-defendant

Ocelia Perkins. The government adduced evidence that this fire was deliberately set by Albert Meredith, Jr., and Adar Hassan.

Meredith claimed that he approached Petitioner, saying "we're going to need some money, Mr. Migdaleck, for Junior and Adar Hassan to go burn a house in Pontiac" (Meredith, Sr.; TR 55). Meredith further stated that Petitioner then gave him between $75 and $100, which he in turn gave to his son and Adar Hassan. (Meredith, Sr.; TR 55).

Again, Albert Meredith, Jr. and Adar Hassan, testifying as government witnesses, squarely contradicted Meredith's testimony regarding Petitioner's purported involvement in the fire at the Fildew address. Albert Meredith, Jr. said that his father gave him $10 or $15 in his private office at Town and Country for materials to start the fire, and no one else was present during their conversation. (Meredith, Jr.; TR 407-408). His father had removed the money from his own pocket, never stated that he would obtain the money from Petitioner, and never left the office prior to handing the money to his son. (Meredith, Jr.; TR 408).

Counts XV through XX

Petitioner was acquitted of Counts XV through XX, alleging five separate acts of mail fraud and one act of interstate transportation of securities taken by fraud, with respect to an arson fire at 2983 Carter, Detroit, Michigan, a residential dwelling owned by co-defendant, Doris Lauderdale. The Indictment alleged that the arrangements for the fire were made by co-defendant Lauderdale and Willie Weems.

Meredith claimed he was advised in advance by Willie Weems of his intention to set an arson fire at the Carter address. (Meredith, Sr.; TR 57). Meredith stated that he then requested money from Petitioner to give to Willie Weems to purchase materials to set the fire. (Meredith, Sr.; TR 57-58). Meredith testified that he obtained the money from Petitioner and gave it to Willie Weems, who started an arson fire that same night. (Meredith, Sr.; TR 58).

On cross-examination, Meredith materially altered the substance of his testimony, stating he was uncertain as to whether he obtained the money from Petitioner, and that he may have actually obtained it from Anita Vianueva Sackett, after receiving approval from Petitioner over the phone. (Meredith, Sr.; TR 209-210).

The arsonist, Willie Weems, testified for the government that Meredith had no advance knowledge of the arson fire at the Carter address. Willie Weems had met co-defendant Lauderdale through her daughter at the Carter address. (Weems; TR 554). After co-defendant Lauderdale left her residence, as he had instructed, Weems set a fire near the dining room rear window. (Weems; TR 555-558). Weems then departed the residence in his automobile and circled the area. (Weems; TR 558). While heading back to the Carter address, he passed Meredith in his automobile. The following conversation transpired:

Q. (By Mr. Soisson): And what happened then?

A. He (Albert Meredith, Sr.) had gotten the call from the fire department on the radio monitor box and he wanted to know how come I was not moving faster going to the fire that was only a couple of blocks away, what was happening, was it empty, was it vacant? He wanted to know, so I didn't tell him nothing. I just — but I got in the car and we rode to the corner and we were talking and he suggested that we try to write the job up which would be normal routine as us working together, try to write the job up as a pair and split the funds. If we were successful at signing the job, we would split the money. But I did not agree to that with Meredith.

Q. Okay.

A. Because I knew something that he didn't know. (Weems; TR 559).

Thus, Weems demonstrated that he and Meredith had no advance discussions regarding the fire at the Lauderdale residence. Accordingly, no disbursement of funds from Petitioner to Meredith could have occurred for that purpose.

Counts XXI and XXII

Petitioner was acquitted of two counts of mail fraud alleged against him with respect to an arson fire occurring at 11425 Lauder, Detroit, Michigan, a residence owned by Joyce Manns. The arson fire was allegedly committed by Adar Hassan after arrangements were made with co-defendant, Joyce Scott.

Meredith said that prior to the fire he had a conversation with Petitioner and requested funds to give to Adar Hassan to purchase materials to start the fire. (Meredith, Sr.; TR 61). He testified that he obtained $75 from Petitioner, which he gave to Adar Hassan so that he could start the fire. (Meredith, Sr.; TR 62, 204-207).

Adar Hassan, however, directly contradicted Meredith, expressly denying that he ever received money from Meredith for materials with which to start the fire at the Lauder address. (Hassan; TR 732).

Count XXIII

Petitioner was convicted of Count XXIII (R. 138: Judgment of Probation/Commitment Order) of the Indictment, (R. 1: Indictment) charging him with mail fraud with respect to an arson occurring at 13908 Thompson, Highland Park, Michigan, owned by Willie Dash. The Indictment (R. 1: Indictment) alleged that the fire was arranged by Willie Weems and co-defendant, Michael White.

Meredith claimed that he obtained funds between $50 and $100 from Petitioner and gave the money to Willie Weems to purchase materials for starting the Dash residence fire. (Meredith, Sr.; TR 64, 207).

Willie Weems, however, did not even mention Meredith as a participant in the Dash arson fire. (Weems; TR 561-569). Willie Weems, testifying for the government, expressly stated that

"Willie, Dale Young and myself got together and pooled our monies together and came up with materials to take care of the claim." (Weems; TR 565).

Other Exculpatory Evidence and Jury Instructions

Meredith's credibility was also undermined by other substantial evidence. In broad summary, all three arsonists separately testified that Meredith's reputation for truth and veracity in the community was poor. (Weems; TR 589-594; Meredith, Jr.; TR 415; Hassan; TR 695-697). Meredith was devastated at trial by prior testimony he gave in a state court proceeding to the effect that he ***had never said a word to Petitioner about arson fires***, that whenever he presented a job to Petitioner ***he presented it as legitimate, and that he never spoke to Petitioner about any illegal activity***. (Meredith, Sr.; TR 226-230).

In extremely significant testimony detailed below, each of the three arsonists testifying for the government separately exculpated Petitioner from any wrongdoing. All three testified that they presented themselves as legitimate salesmen to Petitioner at all times, and that it was well known to all of them that ***Petitioner would never knowingly accept a fire repair contract on an arson fire***. (Meredith, Jr.; TR 392-394; Weems; TR 580-592; Hassan; TR 692-693).

At the conclusion of the trial, the court gave the following jury instructions as to evidence provided by informers taken from Devitt and Blackmar, *Federal Jury Practice and Instructions*, 3d.ed. § 17.06 (1977):

> Now the testimony of one who provides evidence against a Defendant as an informer for pay or for immunity from punishment or for personal advantage or vindication must always be examined and weighed by the jury with greater care and caution than that of an ordinary witness. You, the jury, must decide whether the witness' testimony has been affected by any of those circumstances, or by his interest in the outcome of the case, or by prejudice against the

> Defendant, or by the benefits that he has received either financially or as a result of being immunized from prosecution; and, if you do determine that the testimony of such a witness was affected by any one or more of these factors, you should always keep in mind that such testimony is to be received with great caution and weighed with great care.
>
> If an informer is also a narcotics addict, there are additional reasons why his testimony must be considered with great care. An addict has a constant need for a supply of drugs and for money to support his habit and also may have an abnormal fear of imprisonment in which his supply of drugs might be cut off. These are special circumstances which you may consider in weighing testimony of this kind. You are, of course, to give the testimony such weight as you think proper considering all of the relevant circumstances.
>
> Now an accomplice is one who unites with another person in the commission of a crime, voluntarily and with a common intent. The testimony of one who asserts by his testimony that he is an accomplice may be received in evidence and considered by the jury even though not corroborated by other evidence and given such weight as the jury feels it should have. You should always keep in mind, however, that such testimony is always to be viewed with caution and considered with great care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice *unless you believe that unsupported testimony beyond a reasonable doubt.* (TR 1626-1628).

At the conclusion of the jury charge, Mr. Howard [counsel for Petitioner at trial] objected to the aforementioned charge as not being complete, at TR p 1631, as follows:

> Secondly, I object in connection with the instruction, either the accomplice or the other one, where an individual benefits for the reason that the instruc-

> tion says if you believe the accomplice, then you can go ahead and find guilt. I submit to the Court that the appropriate objection, the appropriate aspect of that charge should be that if you believe the evidence of the accomplice, and you feel that in and of itself is sufficient to satisfy you that it is proof of guilt beyond a *reasonable doubt, then you may accept it.* So I object, and I don't know which one of those charges it is, your Honor.
>
> THE COURT: Well, I think both the ones you are objecting to are charges that have stood the test of time. I think they are both from Devitt & Blackmar and ones that I have given many times and never been reversed on, so I will deny your request.

Petitioner now maintains that, although the trial court instructed the jury on evaluating inculpatory accomplice testimony, its failure to set forth standards for the jury to use in *evaluating exculpatory accomplice testimony was not harmless error.* Not only did the absence of an exculpatory accomplice instruction allow the jury to convict without finding guilt beyond a reasonable doubt, but the use of "reasonable doubt" in the inculpatory instruction was erroneous. (TR 1627). Additionally, for the reasons set forth herein, Petitioner maintains that the district court evaluated the error by utilizing the wrong test according to the recent United States Supreme Court case, *Sullivan* v. *Louisiana*, ___ U.S. ___, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) which must be applied to a Petitioner seeking review under 28 U.S.C. § 2255.

REASONS FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN HOLDING THAT THE DISTRICT COURT'S IMPROPER DEFINITION OF "REASONABLE DOUBT" IN ITS JURY INSTRUCTIONS WITH RESPECT TO ACCOMPLICE TESTIMONY DID NOT REQUIRE VACATION OF HIS SENTENCE UNDER 28 U.S.C. §2255 IN LIGHT OF *SULLIVAN* v. *LOUISIANA*, — U.S. —, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993).

A. Introduction

The trial testimonies of admitted arsonists, Al Meredith, Jr., Adar Hassan and Willie Weems were entirely exculpatory. Despite this wealth of exculpatory evidence, the trial judge committed an egregious error by instructing the jury on how it should treat inculpatory accomplice testimony in deciding whether to convict, without instructing the jury on how it should treat the substantial exculpatory accomplice testimony under the principles articulated by the United States Supreme Court in *Cool* v. *United States*, 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972) and by the Sixth Circuit Court of Appeals in *United States* v. *Stulga*, 531 F.2d 1377 (6th Cir. 1976).

A constitutionally deficient jury instruction which directly impacts the state's burden of proof beyond a reasonable doubt is never harmless error. In fact, such a deficient instruction effectively nullifies the jury verdict under the Sixth Amendment because it allows the jury to convict without a finding of guilt. *Sullivan* v. *Louisiana*, — U.S. —, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Accordingly, Petitioner is entitled to a new trial under 28 U.S.C. § 2255.

B. The Sixth Circuit's Ruling

As set forth in Petitioner's Statement of Facts, the Sixth Circuit Court of Appeals affirmed the district court's judgment by reviewing the jury instruction on reasonable doubt in context with the jury instructions *as a whole*, without analyzing whether the instructional omission about exculpatory accomplice testimony improperly shifted the government's burden of proof. The Court stated:

> Here, Migdaleck reiterates his contention that the district court's jury instruction improperly defined reasonable doubt under *Cool* and *Stulga*, and that *Sullivan* requires that he be retried as a result. The key part of the instruction reads as follows: "You should never convict a Defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt." Based on the jury instructions as a whole, and this portion of them in particular, we conclude that the district court correctly described the government's burden of proof, and that *Sullivan*, which involved a further qualitative, "grave uncertainty"/ "substantial doubt" definition of reasonable doubt, is thus inapplicable to the facts of this case. Accordingly, this Court's previous plain error analysis remains valid, and we do not reach the question of whether *Sullivan* has retroactive effect. (Appendix C, C-4–C-5)

The Sixth Circuit Court of Appeals took too narrow a view of the instruction on inculpatory accomplice testimony, when measured against the wealth of exculpatory evidence in the case, the dearth of inculpatory evidence, and the rules of *Cool* and *Stulga*, which were recently given heightened constitutional import in *Sullivan*, *supra*.

Although the trial court instructed the jury on evaluating inculpatory accomplice testimony, its failure to set forth, in full, the appropriate standards for evaluating exculpatory accomplice testimony was neither harmless nor plain error. The absence of the appropriate exculpatory instruction allowed the jury to convict Petitioner without finding him guilty beyond a reasonable doubt. In addition, the use of "reasonable doubt" in the inculpatory portion of the instruction further compounded the error. In short, both the district court and the Court of Appeals evaluated the instructional error using the wrong test under *Sullivan* v. *Louisiana*, as set forth, *infra*.

C. Analysis

The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* . . ." (emphasis added). In *Duncan* v. *Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968) and in *Cool* v. *United States*, 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972), the Supreme Court found this right to trial by jury in serious criminal cases to be "fundamental to the American scheme of justice." The right includes, of course, as its most important element, the right to have a jury, rather than the judge reach the requisite finding of "guilty". See *Sparf and Hanson* v. *United States*, 156 U.S. 51, 105-106, 15 S.Ct. 273, 39 L.Ed. 343 (1895).

Although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, the judge may not direct a verdict for the government no matter how overwhelming the evidence. See *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-573, 97 S. Ct. 1349, 51 L.Ed.2d 642 (1977); *Carpenters* v. *United States*, 330 U.S. 395, 410, 67 S. Ct. 775, 782, 91 L.Ed.2d 973 (1947). The prosecution bears the burden of proving all elements of the offense charged as prescribed by the Due Process Clause and must persuade the fact-finder "beyond a reasonable doubt" of the facts necessary to establish each of those elements. See *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 179, 24 L.Ed.2d 160 (1970); *Cool* v. *United States*, *supra* at 104.

In Petitioner's original appeal to Sixth Circuit, the central issue was his assertion that the trial court erred in failing to properly instruct the jury pursuant to *Cool* v. *United States*, *supra* and *United States* v. *Stulga*, 531 F.2d 1377 (6th Cir. 1976), *appeal aft. remand* 584 F.2d 142 (6th Cir. 1978). Petitioner asserted in the Sixth Circuit that the trial court erred in failing to give an instruction which would enhance the effect of the exculpatory testimony of the three arsonists.

The court instructed the jury:

> . . . The testimony of one who asserts by his testimony that he is an accomplice may be received in

> evidence and considered by the jury even though not corroborated by other evidence and given such weight as the jury feels it should have. You should always keep in mind, however, that such testimony is always to be viewed with caution and considered with great care. *You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that unsupported testimony beyond a reasonable doubt.* (emphasis added)

Counsel for Petitioner objected to the foregoing instruction, stating that the instruction that should have been given was:

> If you believe the evidence of the accomplice, and you feel that in and of itself is sufficient to satisfy you that it is proof of guilt beyond a reasonable doubt, then you may accept it.

In addition, counsel for Petitioner requested the court to instruct the jury on the standard for evaluating accomplice testimony pursuant to *Cool* v. *United States*, *supra,* and *United States* v. *Stulga*, *supra.*

In *Cool* v. *United States*, *supra*, an accomplice testified for the defense and his testimony was completely exculpatory to Mrs. Cool. Despite this, over defense counsel's objection, the district court instructed the jury to consider the accomplice testimony if it found it true beyond a reasonable doubt. 409 U.S. at 102. The Supreme Court reversed, finding the instruction placed an improper burden on the defense, obstructed the defendant's Sixth Amendment right to present exculpatory accomplice testimony to the jury and, in effect, reduced the government's burden of proof. 409 U.S. at 103, 104.

The imposition of such a burden, the Court found, could allow the jury to convict despite its failure to find guilt beyond a reasonable doubt. *Cool*, 409 U.S. at 103. More significantly, in a footnote, 409 U.S. 103, n.4, the Supreme Court also found it confusing and unfair to instruct jurors that they could convict on the basis of accomplice testimony without also telling them *that they could also acquit on this basis.* 409 U.S. at 103, n.4. The Supreme Court stated as follows:

> In the next paragraph of his instruction, the judge stated: 'I further instruct you that the testimony of an accomplice may alone and uncorroborated support your verdict of guilty of the charges in the Indictment if believed by you to prove beyond a reasonable doubt the essential elements of the charges in the Indictment against the defendants.' In light of the fact that the only accomplice testimony in the case was exculpatory, this instruction was confusing to say the least. But even if it is assumed that Voyles' testimony was to some extent inculpatory, *the instruction was still fundamentally unfair in that it told the jury that it could convict solely on the basis of accomplice testimony without telling it that it could acquit on this basis. Even had there been no other error, the conviction would have to be reversed on the basis of this instruction alone.* (emphasis added)

In *United States* v. *Stulga*, *supra*, again several accomplices testified for the government, two of whom partially exculpated the defendant. Defense counsel objected to the court's instruction on accomplice testimony. The court overruled the objection. On appeal, the Sixth Circuit held that the trial court reversibly erred by failing to instruct the jury that it should evaluate an accomplice's exculpatory testimony in light of the "virtual dearth of inculpatory testimony" and the "wealth of exculpatory testimony". *Id.* at 1380. Further, the Court concluded that the lack of precision in the charge could have confused the jury, leading it to conclude that in order to consider the accomplice's testimony at all it had to believe the testimony beyond a reasonable doubt. The Court made this finding, "despite the judge's remarks about the government's burden earlier in the charge." 531 F.2d at 1380.

In the case-at-bar, the Sixth Circuit, in the original appeal filed by the Petitioner (R. 149: Notice of Appeal), concluded that the Petitioner's assignment of error to the trial court's instruction on evaluation of exculpatory accomplice testimony should have been analyzed under the Plain Error Rule, Fed.R.Crim.P. 52(b) (R. 255: Order), which allows notice of

errors affecting substantial rights even when they were not brought to the court's attention. The Court, somehow misreading the objection made by Mr. Howard, counsel for Petitioner, stated that because no specific objection was registered at trial, the court was not going to reverse because reversal was not required where there was no miscarriage of justice. In essence, the Court made a finding that the instructional omission did not affect a substantial right.

In June of 1993, however, the United States Supreme Court, in the follow-up case to *Cage* v. *Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L.Ed.2d 339 (1990) (*per curiam*), held that a constitutionally deficient jury instruction on "reasonable doubt" can *never* be harmless beyond a reasonable doubt, *i.e.*, it can never be disregarded as not affecting substantial rights. Fed.R.Crim.P. 52(a). In *Sullivan* v. *Louisiana*, *supra*, the Supreme Court held that because a defendant has a jury trial guarantee, when a constitutionally deficient instruction on reasonable doubt is given, there has been no jury verdict within the meaning of the Sixth Amendment.

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely *unattributable* to the error.

That must be so, because to hypothesize a guilty verdict *that was never in fact rendered* — no matter how inescapable the findings to support that verdict might be — would violate the jury trial guarantee, which is a substantial right in every case. *Id.* at 2081-2082.

In *Sullivan*, the Court elevated the type of error that occurred in *Cage*, *supra*; *Stulga*, *supra*; and *Cool*, *supra* to the kind of constitutional injury that infects the most important element of the Sixth Amendment guarantee: a jury verdict of guilty beyond a reasonable doubt. The Court stated that the harmless error analysis of *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) required a reviewing court to consider what effect the error in question *actually had on*

the verdict — not its likely effect on a hypothetically reasonable jury. Thus, Justice Scalia opined that a deficient instruction regarding the beyond a reasonable doubt standard leads inescapably to an invalid jury verdict. This invalid verdict becomes a clear violation of the Sixth Amendment, which is not subject to the harmless error rule. A reviewing court might speculate about what a reasonable jury would have done, but that would deny the defendant the right to have the jury decide guilt or innocence. *Sullivan* v. *Louisiana*, 113 S.Ct. 2078, at 2081-2082, *supra*.

Justice Scalia also took a brief look at this question under the analysis suggested by *Arizona* v. *Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) which distinguishes between structural defects and mere trial errors. The Court indicated that a deficient instruction on reasonable doubt is a structural defect and, as such, is not susceptible to harmless error analysis. Justice Scalia reaffirmed that Opinion in *Sullivan*, at 113 S.Ct 2083.

In one of the rare cases where all of the Justices agreed, concurring Chief Justice Rehnquist expressed doubt that the *Cage* error is much different from instructions embodying constitutional presumptions. Questioning whether the ability to conduct harmless error analysis is dependent on the existence of "beyond a reasonable doubt" jury findings, Rehnquist pointed out "the fact that juries do not usually make explicit factual findings," but *agreed* that a constitutionally deficient reasonable doubt instruction is a "breed apart" from other instructional errors.

Unlike the Sixth Circuit panel in this case, courts have consistently recognized that an instruction in violation of *Cool* is of constitutional magnitude, violating the principles of presumption of innocence and reasonable doubt. In *Cupp* v. *Naughten*, 414 U.S. 141, 146-147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973), the Supreme Court expressly recognized that Cool exemplified an instance in which an instruction can rise to the level of constitutional error. The Eleventh Circuit stated that it is important to recognize that "[t]he ultimate question is whether there is a reasonable possibility that the jury

understood the instructions in an unconstitutional manner." *Peck* v. *Kemp*, 784 F.2d 1479, 1489 (11th Cir. 1986), *cert. denied*, 100 S. Ct. 737, 44 U.S. 1047, 62 L.Ed2d 733, *reh denied*, 107 S.Ct. 912, 93 L.Ed.2d 862. In *Gagne* v. *Meachum*, 406 F. Supp.1213 (D. Mass. 1978), *aff'd*, 602 F.2d 471, *cert. denied*, 100 S. Ct. 524, 444 U.S. 992, 62 L.Ed.2d 422, a district court cited *Cupp*, *supra*, and *Cool*, in stating that "[t]here may very well be situations where a particular erroneous instruction is so offensive as to require reversal *without regard to the remainder of the charge*." 406 F. Supp. 1213, 1218, n. 8 (D. Mass. 1978), *aff'd*, 602 F.2d 471, *cert. denied*, 100 S. Ct. 524, 444 U.S. 992, 62 L.Ed.2d 422. (emphasis added)

Now, *Sullivan* recognizes that, as a matter of law, instructional errors or omissions which infect the instructions, and the verdict as a whole by improperly shifting the burden of proof, can never be deemed harmless error, because the jury could convict a defendant upon proof less than beyond a reasonable doubt.

Here, as in *Stulga*, *supra*, Petitioner did not testify. The jury's evaluation of the exculpatory testimony of all three arsonists was critical to Petitioner's defense. Notwithstanding defense counsel's objection the jury was given no basis for evaluating the exculpatory accomplices' testimonies. This instructional omission, as explained in *Cool* and *Stulga*, was of constitutional magnitude, such that the Court cannot review the error by isolating the instruction, and then reviewing it among the instructions "as a whole."

In light of the foregoing, the Court of Appeals' analysis of the deficient instruction on inculpatory evidence and reasonable doubt was erroneous. The Court read the instructions "as a whole"instead of determining whether an error of constitutional magnitude occurred under *Cool* and *Stulga*, taken together with *Sullivan*. The Court improperly reserved the plain error analysis when clearly such an analysis no longer applies in this setting. A finding that there was or was not a miscarriage of justice does not apply. When evaluating a constitutionally deficient reasonable doubt instruction, *Sullivan* specifically holds that:

Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt — not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. See *Yates*, *supra*, 500 U.S., at ___- ___, 111 S.Ct., at 1898 (SCALIA, J., concurring in part and concurring in judgment). The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. See *Bollenbach* v. *United States*, 326 U.S. 607, 614, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946).

Insofar as the possibility of harmless error review is concerned, the jury-instruction error in this case is quite different from the jury-instruction error of erecting a presumption regarding an element of the offense. A mandatory presumption — for example, the presumption that a person intends the ordinary consequences of his voluntary acts — violates the Fourteenth Amendment, because it may relieve the State of its burden of proving all elements of the offense. *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *Francis* v. *Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

* * *

> But the essential connection to a "beyond-a-reasonable-doubt" factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings. A reviewing court can only engage in pure speculation — its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty." *Rose*, *supra*, 478 U.S., at 578, 106 S.Ct., at 3106. *Id.* at 2082.

Accord, *United States* v. *Colon-Pagan*, 1 F.3d 80, 82 (1st Cir. 1993).

In light of the foregoing, the United States Supreme Court's decision in *Sullivan* mandates a finding that the instructional error which occurred in this case yields a misdescription of the burden of proof, which vitiates the entire jury verdict. *Cf. Stulga*, *supra* at 1380. Fundamental fairness and the Sixth Amendment require that the Petitioner be granted a new trial since he was, in effect, denied his right to a jury trial.

D. Retroactivity of *Sullivan* v. *Louisiana*

The retroactivity analysis employed in *Teague* v. *Lane*, 489 U.S. 288, 109 S.Ct. 1061, 103 L.Ed.2d 334 (1989) should apply in this case. This Court should give retroactive application to *Sullivan* v. *United States*, *supra*.

In *Teague*, *supra*, the United States Supreme Court adopted Justice Harlan's determination on retroactivity for cases on collateral review explicated in *Mackey* v. *United States*, 401 U.S. 667, 675, 91 S.Ct. 1160, 1164, 28 L.Ed.2d 404 (1971). In *Mackey*, Justice Harlan explained the rationale for such a distinction and the retroactive application of new rules only to cases pending on direct review. The Court, in *Teague*, echoed Justice Harlan's belief that new rules generally should not be applied retroactively for cases on collateral review. *Teague*, *supra* at 109 S.Ct. at 1073. The Court found that it is generally sounder in adjudicating *habeas* petitions to apply the law prevailing at the time a conviction became final than it is to seek

to dispose of *habeas* cases using intervening changes in constitutional interpretation. 109 S.Ct. at 1073.

However, in *Mackey*, *supra*, Justice Harlan identified two exceptions to the general rule of non-retroactivity for cases on collateral review. First, a new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law — making authority to proscribe. 109 S. Ct. 1073, citing *Mackey*, *supra*, 401 U.S. at 692, 91 S. Ct. at 1180. Second, Justice Harlan indicated that a new rule should be applied retroactively if it requires the observance of new procedures that are implicit in the concept of ordered liberty.[4]

Before application of the *Teague* analysis, however, a Court must determine the threshold question of whether a new case, such as *Sullivan*, has *actually decided a new rule*. In *Teague*, the Court stated the test for deciding whether a case has announced a new rule as follows:

> In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the state or the federal government. (citations omitted)
>
> * * *
>
> To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. *Teague*, *supra*, 109 S.Ct. at 1070.

Close examination of the Court's rationale in *Sullivan* decision easily reveals that the Court did not announce a new rule which imposed a new obligation on the states or federal government. *Sullivan* simply interprets misinformed jury instructions on reasonable doubt as reaching Sixth Amendment constitutional magnitude and mandates that such instruc-

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4 In *Teague*, however, the Court modified the second exception, indicating that its scope is limited to those new procedures without which the likelihood of an accurate conviction is seriously diminished. *Teague*, *supra* at 1077.

tional error cannot be vitiated by application of the plain or harmless error rules.

In *Sullivan*, the Supreme Court clarified its previous ruling in *Cage* v. *Louisiana*, *supra*, stating that: a jury instruction which provides a constitutionally inadequate definition of reasonable doubt can never be harmless error under the test of *Chapman* v. *California*, *supra*. In *Sullivan*, Justice Scalia discussed a "constitutional jury verdict whose meaning is within the Sixth Amendment." He opined that *Chapman* v. *California*, *supra*, required a reviewing court to consider what effect the error in question actually had on the verdict, not its likely effect on a hypothetical reasonable jury. Justice Scalia then pointed out that the *Cage* error is much different from instructional errors embodying unconstitutional presumptions. The *Cage* error on "reasonable doubt," in contrast to an error embodying unconstitutional presumptions, vitiated all of the jury's findings. Scalia held that by vitiating the jury's findings, a defendant has been denied his Sixth Amendment guarantee to a trial by jury, and must be given a new trial.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Petitioner respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari, or, in the alternative, enter an order summarily reversing the Opinion and Order of the Sixth Circuit Court of Appeals.

Respectfully submitted,

By: /s/ RICHARD M. LUSTIG
Counsel of Record
Attorney for Petitioner-Appellant
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DATED: November 21, 1994

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

OPINION

–NOT FOR PUBLICATION–

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

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(United States Court of Appeals — Sixth Circuit)

(Filed March 7, 1990)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. OCELIA M. PERKINS; DONALD J. McQUEEN; JOYCE SCOTT; PAMELA H. WILLIAMS; ANDERS MIGDALECK; and STELLA H WARE, Defendants-Appellants — Nos. 88-1953; 1954; 1955; 1956; 88-2031; 88-2110; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: NELSON and RYAN, Circuit Judges;
and MEREDITH, District Judge.*

RYAN, J., Circuit Judge.

Defendants Anders Migdaleck, Donald J. McQueen and Pamela H. Williams appeal their convictions for mail fraud, 18 U.S.C. § 1341, and interstate transportation of securities taken by fraud, 18 U.S.C. § 2314. Defendants Ocelia M. Perkins, Stella H. Ware and Joyce Scott appeal their convictions for mail fraud, 18 U.S.C. § 1341. All convictions arose from a scheme to defraud insurance companies by intentionally setting fires to residential homes located in

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* **The Honorable Ronald E. Meredith, United States District Judge for the Western District of Kentucky, sitting by designation.**

the Detroit area in order to collect insurance proceeds. Several issues are raised on appeal but none require reversal. Accordingly, we affirm.

I.

Defendant Migdaleck, a licensed contractor and owner of Town and Country Builders and Anders Construction Company purportedly organized the arson scheme and paid the participants from the insurance proceeds. Defendants McQueen, Williams and Perkins were homeowners who arranged to have fires set at their respective homes. Defendant Ware helped arrange the fire at defendant Perkins' home. In each case, claims were made with the homeowners' insurance carriers through use of mails.

On January 6, 1988, all the defendants and others were charged with mail fraud, 18 U.S.C. § 1341, and interstate transportation of securities taken by fraud, 18 U.S.C. § 2314, in a twenty-three count indictment. Defendant Midgaleck [*sic*] was indicted on all twenty-three counts as was Anita Vianveva Sackett, a licensed public adjuster, who worked for defendant Migdaleck. Sackett entered into a plea agreement and testified at trial in exchange for leniency. The arsonists who set the fires also testified.

The first two counts involved the January 18, 1983 arson fire at defendant McQueens' residence. Migdaleck and McQueen were charged with mail fraud and interstate transportation of securities taken by fraud. Migdaleck was acquitted and McQueen was convicted.

Counts three and four involved the February 25, 1983 arson fire at the residence of Ronald Pitts. Pitts, Midgaleck and McQueen were charged with two counts of mail fraud. Pitts pled guilty prior to trial and testified in exchange for leniency. Both Migdaleck and McQueen were convicted.

Counts five through nine involved the July 27, 1984 arson fire at White's residence. Migdaleck and White were charged with five counts of mail fraud. Both were convicted.

Counts ten through twelve involved the October 20, 1983 arson fire at defendant Williams' residence. Migdaleck, White and Williams were charged with mail fraud and two counts of interstate transportation of securities taken by fraud. Migdaleck was acquitted and White and Williams were convicted.

Counts thirteen and fourteen involved the May 11, 1983 arson fire at Perkins' home. Migdaleck, Perkins and Ware were charged with two counts of mail fraud. All were convicted.

Counts fifteen through twenty involved the January 15, 1983 arson fire at the home of Doris Lauderdale. Lauderdale and Migdaleck were charged with interstate transportation of securities taken by fraud and five counts of mail fraud. Both were acquitted.

Counts twenty-one and twenty-two involved the March 15, 1983 arson fire at the home of Joyce Manns. Migdaleck and Scott were charged with two counts of mail fraud. Migdaleck was acquitted and Scott was convicted.

Count twenty-three involved the January 18, 1984 arson fire at a residence owned by Willie Dash. Migdaleck and White were charged with mail fraud. Both were convicted.

Following the imposition of sentences, defendants appealed. Michael White's appeal was dismissed as untimely.

II.
DEFENDANT MIGDALECK

A. Failure to Instruct Jury on Exculpatory Testimony.

Defendant Migdaleck contends the trial court erred in failing to properly instruct the jury, pursuant to *Cool* v. *United States*, 409 U.S. 100 (1972), and *United States* v. *Stulga*, 531 F.2d 1377 (6th Cir. 1976), *appeal after remand*, 584 F.2d 142 (6th Cir. 1978), concerning evaluation of the exculpatory testimony offered by the three arsonists.

The testimony of arsonists Al Meridith [*sic*], Jr., Willie Weems and Adar Hassan was essentially favorable to defendant Migdaleck. The three testified that the arson fires were represented to Migdaleck as legitimate losses and all three witnesses inferred that Al Meredith, Sr. operated the scheme. However, Al Meredith, Sr. testified that Migdaleck knew about the scheme, had made Sackett a public adjustor to further the scheme, paid commissions to the arsonists, and provided the funds used to purchase the materials used to start the fires.

On appeal, defendant Migdaleck asserts the trial court erred in failing to give an instruction which would enhance the effect of the exculpatory testimony of the three arsonists.

The court instructed the jury:

> The testimony of one who asserts by his testimony that he is an accomplice may be received in evidence and considered by the jury even though not corroborated by other evidence and given such weight as the jury feels it should have. You should always keep in mind, however, that such testimony is always to be viewed with caution and considered with great care. You should never convict a Defendant upon the. unsupported testimony of an alleged accomplice unless you believe that unsupported testimony beyond a reasonable doubt.

(Emphasis added.) This instruction was requested by defendant McQueen and is based on Devitt and Blackmar, *Federal Jury Practice and Instructions*, 3d ed, § 17.06 (1977).

At trial, after the court finished instructing the jury, counsel for defendant Migdaleck objected to the foregoing instruction, stating that the instruction that should have been given is:

> [I]f you believe the evidence of the accomplice, and you feel that that in and of itself is sufficient to

satisfy you that it is proof of guilt beyond a reasonable doubt, then you may accept it.

On appeal, defendant contends that, based on his objection and requested single-sentence instruction, the trial court should have been alerted to its duty to instruct the jury on the standard for evaluating accomplice testimony pursuant to *Cool* v. *United States*, 409 U.S. 100 (1972), and *United States* v. *Stulga*, 531 F.2d 1377 (6th Cir. 1976), *appeal after remand*, 584 F.2d 142 (6th Cir. 1978). We disagree.

In *Cool*, the accomplice testified for the defense and his testimony was completely exculpatory. Over defense counsel's objection, the district court instructed the jury to consider the accomplice testimony if it found it true beyond a reasonable doubt. 409 U.S. at 102. The Supreme Court reversed, finding the instruction placed an improper burden on the defense, obstructed the defendant's sixth amendment right to present exculpatory accomplice testimony to the jury, and, in effect, reduced the government's burden of proof. 409 U.S. at 103, 104. In a footnote, the Court also found it confusing and unfair to instruct the jurors that they could convict on the basis of accomplice testimony without telling them they could also acquit on this basis. 409 U.S. at 103, n.4.

In *Stulga*, several accomplices testified for the government. Two of them partially exculpated defendant. The defense counsel objected to the court's instruction on accomplice testimony and specifically requested that the jury be instructed that exculpatory testimony of an accomplice did not have to be believed beyond a reasonable doubt or by a preponderance. *Id.* at 1380. The court declined to do so. On appeal, this court held the trial court committed reversible error in failing to instruct the jury on the manner in which to evaluate an accomplice's exculpatory testimony in light of the "virtual dirth [*sic*] of inculpatory testimony" and the "wealth of exculpatory testimony." *Id.* at 1380. This court concluded that the lack of precision in the charge could have confused the jury and led it to conclude that in order to consider the accom-

plice's exculpatory testimony at all, it had to believe the testimony beyond a reasonable doubt. *Id.*[1]

Here, unlike the situation in *Stulga* or *Cool*, defense counsel's requested instruction was not a request that the jury be advised on how to evaluate exculpatory accomplice testimony (*Stulga*), or a request to instruct the jury that accomplice testimony can provide the basis of acquittal (*Cool*). Rather, defense counsel's objection and proposed instruction, in effect, asked the court to instruct the jury that it could accept inculpatory accomplice testimony if it believed the testimony beyond a reasonable doubt. It was essentially the same instruction as was given by the court, although the court's instruction stated the matter more understandably and more accurately.

We are presented then with a situation in which the defendant assigns error to the trial court's failure to instruct the jury as to the proper manner in which to evaluate exculpatory accomplice testimony, although no timely and understandable request for such an instruction was made at trial and no objection registered to its omission. Consequently, we review this assignment of error under the plain error rule. Fed. R. Crim. P. 52(b). Where, as here, no specific objection was registered at trial, reversal is required only where a miscarriage of justice would result. *United States* v. *Hook*, 781 F.2d 1166, 1172 (6th Cir.), *cert. denied*, 479 U.S. 882 (1986). We think it is manifest that no miscarriage of justice resulted from the court's failure to instruct, sua sponte, on the manner in which the jury might have evaluated the exculpatory accomplice testimony, and defendants cite no authority to the contrary.

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1 **On appeal, following the conviction on remand, the defendant in *Stulga* again contested the court's instruction on accomplice testimony. The trial court left unchanged that portion of the instruction objected to here; instead, the court merely added that exculpatory accomplice testimony should be considered and weighed along with all other evidence and could be the bases of a not guilty verdict. In *United States* v. *Stulga*, 584 F.2d 142, 144-145 (6th Cir. 1978), this court held the instruction given by the trial court was sufficient.**

See United States v. *Vigi*, 515 F.2d 290 (6th Cir.), *cert. denied*, 423 U.S. 912 (1975).

B. Denial of New Trial.

Defendant Migdaleck also contends the trial court erred in failing to recognize that it could weigh the credibility of witnesses when reviewing a new trial motion on the ground that the verdict was against the great weight of the evidence. Fed. R. Crim. P. 33.

The trial court's authority in deciding a motion for a new trial on the ground that the verdict is against the great weight of the evidence, Fed. R. Crim. P. 33, is much broader than its authority on a motion for acquittal based on the sufficiency of the evidence, Fed. R. Crim. P. 29. *United States* v. *Turner*, 490 F. Supp. 583, 593 (E.D. Mich. 1979), *aff'd* (without opinion), 633 F.2d 219 (6th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States* v. *Arrington*, 757 F.2d 1484, 1485 (4th Cir. 1985). In the former, the court may weigh the evidence and consider the credibility of the witnesses. *Turner*, 490 F. Supp. at 593; *Arrington*, 757 F.2d at 1485.

Motions for new trial are disfavored and they are granted only with great caution. *Turner*, 490 F. Supp. at 593. Ordinarily, a new trial should be granted only where the evidence weighs so heavily against the verdict that a miscarriage of justice would result if the verdict were allowed to stand. *Turner*, at 593; *Arrington*, at 1485. A decision on a motion for new trial will not be upset on appeal absent an abuse of discretion. *Arrington*, 757 F.2d at 1486.

The theory of defendant Migdaleck's motion is that the principal witness against him, Al Meredith, Sr., was completely unworthy of belief. At the hearing on the motion, defendant contended that without Meredith Sr.'s testimony, there was no proof defendant participated in the arsons, and the arsons were the whole crux of the case. The government contended that it had shown by circumstantial and direct evidence that defendant Midgaleck [*sic*] controlled the operation in that he paid all the par-

ticipants and controlled the disbursement of insurance proceeds.

The trial court denied the new trial motion for two reasons: first, the court did not believe credibility questions could be raised by a new trial motion pursuant to *United States* v. *Johnson*,[2] 487 F.2d 1278, 1280 (4th Cir. 1973), and there was no basis to substitute the court's judgment for the jury in weighing the credibility of Al Meredith, Sr.; second, the court found the other evidence of Midgaleck's [*sic*] guilt was sufficient to support the verdict. The court noted that the jury was quite perceptive and found defendant failed to present anything to establish that the evidence preponderated heavily against the verdict.

Defendant is correct that the trial court failed to recognize that, on a motion for new trial on the ground that the verdict is against the great weight of the evidence, the court was indeed entitled to consider the credibility of the witnesses. If the sole basis for the district court's denial of the new trial motion was that credibility was not a proper subject for the court to examine, we would be inclined to remand this case to the district court to consider the credibility question. However, the court also found that the other evidence inculpating Migdaleck was sufficient to support the verdict, a conclusion well-supported in the record. Moreover, the district court commented favorably on the jury's ability to evaluate the evidence since it acquitted defendant Migdaleck on some of the charges.

Given the record supported alternative basis for the trial court's denial of the new trial motion, and the rule that a new trial should be granted on the ground here asserted only when the evidence preponderates heavily against the verdict, we cannot say the trial court abused its discretion in denying defendant's motion.

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2 *Johnson* involves a new trial motion based on newly discovered evidence, not based on a verdict that is against the great weight of the evidence.

C. Constructive Amendment of Indictment.

Defendants Migdaleck and Williams contend that the trial court constructively amended the indictment when it allowed Anita Sackett to testify that Migdaleck inflated the building loss portion of insurance claims by directing the adjustor to "go heavy" on the losses and testify that the claim for the fire at White's residence was indeed inflated.

At trial, counsel for defendant Migdaleck objected to Sackett's testimony on the inflation of the building loss portion of insurance claims on relevancy grounds. The objection was overruled.

The indictment against defendants Migdaleck and White was based on the premise that defendants were involved in a scheme to defraud insurance companies by intentionally setting fires to residential homes and using the mails to collect the insurance proceeds. The indictment did not allege that defendants inflated the building portion of the insurance claims.

A court may not require a defendant to be tried on charges that are not included in the indictment. *Stirone* v. *United States*, 361 U.S. 212 (1960). A constructive amendment occurs when the charging terms of the indictment are, in effect, altered by the prosecutor or the court. *United States* v. *Atisha*, 804 F.2d 920, 927 (6th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987) (quoting *United States* v. *Jones*, 647 F.2d 696, 700 (6th Cir.), *cert. denied*, 454 U.S. 898 (1981)). A variance occurs when the charging terms of the indictment are left unaltered but the evidence offered at trial proves materially different from those alleged in the indictment. *Id.*

A constructive amendment is per se prejudicial but a variance is not grounds for reversal unless the defendant's substantial rights are affected. *United States* v. *Goldfarb*, 643 F.2d 422, 433 (6th Cir.), *cert. denied*, 454 U.S. 860 (1981).

To determine whether a constructive amendment occurred, the court must decide whether *the elements of*

the crime charged were altered. *Atisha*, 804 F.2d at 927 (citation omitted). (Emphasis added.)

The elements the government is required to prove for mail fraud are a scheme to defraud and use of the mails to execute or further the scheme. *United States* v. *Schilling*, 561 F.2d 659, 661 (6th Cir. 1977).

Defendants contend the introduction of evidence that the building loss portion of the claims were inflated, in effect, created an alternate theory for the jury to find defendants had entered into a scheme to defraud and, thus, constituted a constructive amendment of the indictment. The prosecution contends the trial court did not err in admitting the evidence to show the fraudulent nature of the scheme. The government contends the evidence did not change the fact that the scheme to defraud was based on arson but, instead, showed defendants' relationship to the scheme and how they profited by it.

We find that the mail fraud charge in the indictment was the same charge described to the jury and conclude that the introduction of the testimony on claim inflation did not change the basic theory of the fraudulent scheme so as to constitute a constructive amendment of the indictment. *Atisha*, 804 F.2d at 927. Moreover, we hold that had the introduction of the evidence constituted an impermissible variance, any error in admitting the evidence was harmless, *United States* v. *Mahar*, 801 F.2d 1477, 1503 (6th Cir. 1986), since the testimony at trial centered on the scheme to commit arson, the underlying basis for the mail fraud charge set forth in the indictment.

III.

DEFENDANT WILLIAMS' DENIAL
OF EFFECTIVE ASSISTANCE OF COUNSEL.

Defendant Williams also contends that she was denied effective assistance of counsel because her attorney also represented defendant White. Specifically, she contends an actual conflict of interest existed because her counsel

failed to cross-examine Meredith, Sr. and arsonist Willie Weems, although their testimony made the defense of shifting the blame to White a viable option. Defendant claims the trial court failed to inquire about the joint representation and failed to advise defendant about the right to separate representation as required by Fed. R. of Crim. P. 44(c). Williams made no objection below to the joint representation.

Multiple representation is not a per se violation of the sixth amendment right to effective assistance of counsel. *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978). To establish a sixth amendment violation, a defendant who raises no objection below must show that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980).

At oral argument, defendant conceded that the trial court's failure to conduct a Fed. R. Crim. P. 44(c) inquiry did not automatically require reversal. This is in accord with the position of those circuits which have addressed the issue. *See United States* v. *Crespo de Llano*, 830 F.2d 1532, 1539 (9th Cir.), *reh. den.*, 838 F.2d 1006 (9th Cir. 1987) (citations omitted). It is also in accord with the advisory committee notes to Rule 44(c) which state:

> The failure in a particular case to conduct a rule 44(c) inquiry, would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant.

Williams argues that counsel's failure to cross-examine Meredith, Sr. and Weems demonstrated an actual conflict of interest because their testimony revealed that White was more culpable then Williams thus enhancing the likelihood of success of the shifting blame defense.

A conflict of interest must be actual, not hypothetical or merely possible. *Cuyler*, 446 at 350; *United States* v. *Carter*, 721 F.2d 1514, 1537 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984). The defendant must demonstrate that the interests of the jointly represented defendants were so inconsistent

that the pursuit of a plausible argument in favor of one would damage the defense of the other. *Carter* at 1536; *United States* v. *Romero*, 780 F.2d 981, 986 (11th Cir. 1986). In order for a shifting blame defense to give rise to an actual conflict of interest, the defense must be realistically available to defense counsel. *United States* v. *Carter*, 721 F.2d at 1537; *Romero*, at 986.

Defendant Williams relies heavily on the failure of her trial counsel to cross-examine Meredith, St. and Weems on the roles Williams and White played in connection with the fire at the residence owned by Williams. At trial, Meredith, St. testified that Williams wanted no part in the fire at first, but stood in line with the rest of the perpetrators to collect her share of the commission after the fire occurred. Weems, the arsonist, testified that prior to the fire, Williams had him review the insurance policy to make sure the property was adequately insured; Williams agreed to the fire and paid Weems a deposit, a sum Weems required to insure Williams was definite about the plan. Williams testified and denied ever speaking with Meredith, St. or Weems prior to the fire, and denied she was involved in any fraudulent scheme to set her home on fire.

We agree that the evidence of defendant White's participation in the overall scheme, and in particular his involvement in the Williams' fire, was stronger than the evidence the government had against Williams. However, that does not diminish the force of the evidence that Williams was identified as a participant in the scheme to set the home she owned on fire.

We think defendant Williams has failed to show that she stood to gain significantly by abandoning the defense pursued by her trial counsel. She does not contend that her codefendant would have exculpated her. Her only allegation of actual conflict relates to her contention that White is more blameworthy than she is. She does not contend the evidence against her was insufficient to convict. We conclude defendant Williams failed to demonstrate an actual conflict of interest. *See Carter*, 721 F.2d at 1537,

United States v. *Benavidez*, 664 F.2d 1255, 1260-61 (5th Cir.), *reh. denied*, 671 F.2d 1380 (5th Cir.), *cert. denied*, 457 U.S. 1121 and 457 U.S. 1135 (1982).

IV.
DEFENDANT SCOTT

A. Admission of the Check Evidence.

Defendant Scott contends the admission into evidence of two checks written by And.ers Construction Company to Scott and a 1983 check registry from Anders Construction Company was improper because the evidence was irrelevant, prejudicial, and constituted inadmissible evidence of other crimes and bad acts. Fed. R. Evid. 404(b). At trial, defendant contended the check evidence was inadmissible because the checks were not issued within the time period charged in the indictment and because the checks and the check registry suggested the inference that she was involved in other arson fires for which she was not charged. Defense counsel also contended that the evidence was used to suggest guilt by association.

The government contends that the relevance of the two checks was to show that defendant Scott was not just Migdaleck's secretary, as was claimed, but was paid commissions for bringing business to Anders Construction Company, as were other "programmers," and the check registry was introduced to show the relationship between the various parties to the fraudulent scheme.

The trial court held the checks were relevant and their probative value was not outweighed by their prejudicial effect.

A trial court does not err in admitting evidence that has a tendency to make more or less probable a material proposition for which it is offered, unless it is shown that the probative value of the evidence is substantially outweighed by its prejudicial effect. Fed. R. Evid. 401, 403.

We conclude this evidence was relevant and its probative value was not substantially outweighed by its prejudi-

cial effect. There was strong circumstantial evidence, specifically the testimony of Meredith, Sr. and Hassan, that Scott was a principal in the scheme to burn down the premises on Lauder Avenue on March 15, 1983. The essence of Scott's defense was that she was merely a secretary at Anders Construction and was not involved in the arson for profit scheme. The court admitted the challenged checks upon the government's argument that the checks were admissible as proof that Scott was more than just a secretary, but was a "programmer" being paid commission for bringing arson repair business to Migdaleck, just as other "programmers" were. The check register for 1983 was admitted in order to show that commission checks were written to Meredith, Sr., and Jr., Weems, Hassan, Scott, and other defendants in the case at or near the time of the fire to which each was connected in the testimony, and to show the relationship between the various defendants during 1983. An additional reason the check register was offered and admitted is that the government had possession of some, but not all, of the checks relevant to the arson schemes, and wished to prove, by introduction of the check register, the pattern of issuance of checks related to arson schemes.

We think both the two checks and the 1983 check register were shown to be relevant and were therefore admissible. Moreover, the defendant Scott has failed to demonstrate that the relevance of the three exhibits was substantially outweighed by the possible prejudicial effect of suggesting Scott's involvement in a still wider scheme of arson for profit than the March 15, 1983 Lauder Avenue fire, a point never argued by the government. We conclude the trial court did not err in admitting the challenged exhibits.

B. Sufficiency of the Evidence.

Defendant Scott's second issue on appeal is tied to her first. She contends there was insufficient evidence to convict her of mail fraud because the government failed to prove she entered into a scheme with Migdaleck to

defraud on the dates charged in the indictment. Scott contends the government's case rested on the two challenged checks and the testimony of immunized convicted arsonists, whose credibility was highly questioned. She notes that defendant Migdaleck was acquitted of the charges on which she was convicted.

In order to convict a defendant of mail fraud, the prosecution must prove a scheme to defraud and use of the mails to execute or further the scheme. *United States* v. *Schilling*, 561 F.2d 659, 661 (6th Cir. 1977). Defendant Scott does not contest the sufficiency of the evidence on the use of the mails element of the mail fraud charge.

This court reviews a sufficiency of the evidence claim by determining whether, in viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979), *reh. denied*, 444 U.S. 890 (1979).

Al Meredith, Sr. testified that he spoke with defendant Scott about the March 15, 1983 fire at Joyce Manns' house before it occurred. Scott introduced Manns as a "customer." During the conversation between Meredith, Sr., Manns and Scott, Meredith, Sr. checked Manns' insurance policy and discussed Manns' potential recovery from the fire and where Manns would stay while repairs were being made.

Adar Hassan testified that Meredith, Sr. asked him to meet Scott at Manns' home and set the fire. Hassan met Scott at Manns' home on the day of the fire, went in and, while Scott and the occupants remained downstairs, went upstairs and set the fire.

The two checks were admitted to show defendant Scott was paid commissions by defendant Migdaleck.

The evidence, taken in a light most favorable to the prosecution, establishes defendant Scott was a participant in the scheme to defraud the insurance company and is

sufficient to convict her of two counts of mail fraud, 18 U.S.C. § 1341.

V.

DEFENDANT McQUEEN'S OBJECTION TO THE JURY INSTRUCTION.

Defendant McQueen contends the trial court failed to instruct the jury that the interstate movement of the securities must have been reasonably foreseeable by defendant in order to convict him of interstate transportation of securities taken by fraud, 18 U.S.C. § 2314. The court instructed the jury:

> If the evidence establishes to your satisfaction beyond a reasonable doubt that a Defendant knowingly caused the securities . . . to be transported from one state to another, then the Defendant caused the securities to be transported in interstate commerce within the meaning of the statute. . . .
>
> [*I*]*t is not necessary that the Defendant knew the security would be transported in interstate commerce.*
>
> Of course, it is common knowledge that checks or drafts drawn on an out-of-state bank will be sent to that bank for collection. If . . . a Defendant knowingly caused the checks . . . to be put in interstate commerce, then . . . he has caused it to be transported in interstate commerce within the meaning of the law.

(Emphasis added.) Defendant objected to the instruction, stating that the instruction should have included language that the interstate transportation of the documents must have been reasonably foreseeable to defendant.

The majority of courts addressing the matter have held that the interstate transportation requirement of § 2314 is merely to insure federal jurisdiction and does not impose a requirement that the government prove that the inter-

state transportation was in any way reasonably foreseeable. *United States* v. *White*, 451 F.2d 559, 560 (6th Cir. 1971), *cert. denied*, 405 U.S. 1071 (1972); *United States* v. *Kibby*, 848 F.2d 920, 923 (8th Cir. 1988); *United States* v. *Squires*, 581 F.2d 408, 409-10 (4th Cir. 1978).

Therefore, we conclude the trial court did not err in failing to instruct the jury that the foreseeability of the interstate transportation of the securities is required to convict defendant of interstate transportation of securities taken by fraud, 18 U.S.C. § 2314.

VI.

DEFENDANTS PERKINS AND WARE
DENIAL OF SEVERANCE MOTION.

Defendants Perkins and Ware argue that joinder was improper under Fed. R. Crim. P. 8(b) since they did not participate in the "same series of acts or transactions" as the other defendants. Alternatively, defendants argue that even if joinder was proper under Rule 8(b), severance should have been granted under Fed. R. Crim. P. 14 because of the substantial prejudice to defendants resulting from the jury considering the evidence against other persons in order to convict the defendants.

At trial, all defendants joined in the motion asserting improper joinder, Rule 8(b), and requesting severance due to prejudice, Rule 14; however, only Perkins and Ware address this issue on appeal. The district court held that there was a factual similarity in the counts; the proofs overlapped; the participants had the same objective, to burn homes and collect the insurance; and judicial economy would best be served by joinder. The court further held that the defendants failed to make a strong showing of substantial prejudice and declined to sever the trial under Rule 14.

Joinder of multiple defendants under Rule 8(b) is proper if each count in the indictment arises out of the same series of acts or transactions. *United States* v. *Hatcher*, 680

F.2d 438, 441 (6th Cir. 1982). A group of acts or transactions constitutes a series if they are logically related and involve overlapping proofs. *United States* v. *Swift*, 809 F.2d 320, 322 (6th Cir. 1987) (citing *United States* v. *Johnson*, 763 F.2d 773, 776 (6th Cir.), *cert. denied*, 474 U.S. 862 (1985)). Rule 8(b) is broadly construed in favor of joinder because Rule 14 provides protection against prejudicial joinder. *Swift*, at 322. A significant consideration is whether joinder would promote judicial economy. *Id.* Review of a district court's refusal to sever pursuant to Rule 8 is reviewed for an error of law but is subject to the harmless error standard. *Hatcher*, 680 F.2d at 442.

We conclude joinder was proper. All twenty-three counts of the indictment involved a series of schemes to defraud insurance companies by intentionally setting fire to residential dwellings in order to collect insurance proceeds. The record reveals that defendants Perkins and Ware, as well as the other defendants, were connected to the kingpin of the entire scheme to defraud, defendant Migdaleck, and the mail fraud counts against Perkins and Ware were logically interrelated with the other acts charged in the indictment. *See Johnson*, 763 F.2d at 776. Moreover, joinder served the interest of judicial economy. *See*, *Swift*, 809 F.2d at 322. We conclude, therefore, that joinder was proper under Rule 8(b) .

Under Fed. R. Crim. P. 14, the trial court may order severance if a defendant is prejudiced by joinder of defendants or claims. *Swift*, 809 F.2d at 322. This court reviews the district court's denial of a severance motion under Rule 14 for an abuse of discretion, and to establish an abuse of discretion the defendant must make a strong showing of prejudice. *Id.* The defendant must show the jury was not able to separate and treat distinctively evidence relevant to each defendant and even if some potential jury confusion is established, this must be balanced against society's need for speedy and efficient trials. *Id.* (quoting *United States* v. *Gallo*, 763 F.2d 1504, 1525 (6th Cir. 1985), *cert. denied*, 474 U.S. 1068, and 474 U.S. 1069, and 475 U.S. 1017 (1986)).

Defendants' basic contention on appeal is that they were prejudiced by the spillover of evidence relating to the other arson fires because the evidence against them was not overwhelming.

Albert Meredith, Jr. testified that defendant Ware contacted him and told him that defendant Perkins wished to speak to him about burning a dwelling. Meredith, Jr. spoke to Perkins in Ware's presence and discussed the arson, the fire repairs, and the monetary advancement. They proceeded to Perkins' home where Meredith, Jr. examined Perkins' insurance policy and determined where the fire should be set. Thereafter, the fire was set by Adar Hassan. Perkins admitted Meredith, Jr., Hassan and Ware into her home and then Perkins and Ware left. Hassan set the fire.

Adar Hassan testified that he, Meredith, Jr. and Ware drove to Perkins home on the day of the fire. They discussed what type of fire was required. At Perkins' home, Hassan discussed the location of the fire with defendant Perkins and then asked everyone to leave while he prepared the fire.

"Absent a showing of substantial prejudice, spillover of evidence from one case to another does not require severance." *Johnson*, 763 F.2d at 777 (quoting *Gallo*, 763 F.2d at 1526).

In view of the foregoing evidence, any spillover evidence of other schemes to intentionally set fire to residential dwellings cannot establish substantial prejudice. Moreover, the district court gave the jury cautionary instructions regarding the separate consideration to be give to each defendant. A jury is presumed capable of sorting out evidence and considering each count and each defendant separately. *Swift*, 809 F.2d at 323. That the jury did so in the instant case is evidenced by the fact that one homeowner was acquitted and defendant Migdaleck was acquitted in part.

As this court said in *Swift*, "even if there is some potential for jury confusion, it is small and does not outweigh

'society's need for speedy and efficient trials.'" *Id.* (quoting *Gallo*, 763 F.2d at 1525). The trial court did not abuse its discretion in denying defendants' severance motion under Rule 14.

VII.

DEFENDANT PERKINS' CO-CONSPIRATOR HEARSAY OBJECTION.

Defendant Perkins contends that the trial court erred in admitting the hearsay testimony of Adar Hassan and Albert Meredith, Jr.

Defendant did not object to the testimony by Hassan that he spoke to Perkins at her home on the day of the fire and Perkins had told him she wanted the fire set in the kitchen. Thus, we are not obligated to address this issue. In all events, the testimony appears admissible as an admission under Fed. R. Evid. 801(d)(2)(A).

Defendant did object to the testimony of Albert Meredith, Jr. regarding Perkins' agreement to proceed with plans to set a fire at her home.

Meredith, Jr. testified that he had spoken with defendant Perkins and defendant Ware about the possibility of setting a fire at Perkins' residence. He reviewed Perkins' insurance policy and inspected her home to select a location for the fire. He testified that Perkins took some time to think about it but eventually he heard from defendant Ware that Perkins was ready to have a fire.

Defendant objected to Meredith, Jr. testifying as to what defendant Ware told him Perkins said as the testimony was hearsay. The court stated the testimony was admissible under Fed. R. Evid. 801(d)(2)(E) as a statement of a co-conspirator.

On appeal, defendant Perkins contends the trial court failed to make the preliminary determination required for the admission of a co-conspirator's statement; namely, that a conspiracy existed, and that the statement was made during the course of and in furtherance of the conspiracy.

Fed. R. of Evid. 801(d)(2)(E) provides:

> (d) A statement is not hearsay if —
>
> * * *
>
> (2) The statement is offered against a party and is
>
> * * *
>
> (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

In *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978), this court held that the admissibility of a co-conspirator's statement under Rule 801(d)(2)(E) is for the court to decide under Fed. R. Evid. 104(a) and the preliminary question to be answered is whether the co-conspirator's statement falls within the Rule, that is, whether a conspiracy existed and whether the statement was made in the furtherance of the conspiracy. *Id.* at 984, 985.

The United States Supreme Court in *Bourjaily* v. *United States*, 483 U.S. 171 (1987), agreed that Rule 104(a) governs the admissibility of a co-conspirator's statement and a preponderance of the evidence standard applies. *Id.* at 175. The Court also held that the trial court may consider the out-of-court statement of the alleged co-conspirator sought to be admitted when making its preliminary determination on whether the co-conspirator statement is admissible under 801(d)(2)(E). *Id.* at 180. However, the court declined to decide whether the lower court could rely solely upon the co-conspirator's hearsay statement to establish that a conspiracy existed by a preponderance of the evidence under Rule 104(a). *Id.*

In this case, defendant Perkins contends that Meredith, Jr.'s hearsay testimony that Ware told him that Perkins said she was ready to have the fire was the only testimony linking Perkins to the conspiracy. That is not the case. Meredith, Jr. testified that he spoke with Perkins about a plan to set fire to her home prior to the time the alleged

statement by Ware was made, and Hassan testified that he discussed the location of the fire with Perkins the day the fire was set.

In light of the above testimony, the hearsay statement of Meredith, Jr., that Ware said that Perkins said she was ready to have the fire, is a statement in furtherance of the conspiracy, made by a co-conspirator during the course of the conspiracy. Nor is the Meredith, Jr. testimony challengable as double hearsay, since the Perkins statement to Ware is "not hearsay" under Fed. R. Evid. 801(d)(2)(A), since it is a statement of admission. Therefore, the trial court did not abuse its discretion in admitting the co-conspirator statements as evidence. *See United States* v. *Rios*, 842 F.2d 868, 874 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 840 (1989).

Defendant Perkins also contends that the trial court failed to make a determination on the record that sufficient testimony existed to connect Perkins with the conspiracy charge, when the court held that Meredith, Jr. could testify as to what Ware told him Perkins said under the co-conspirator exception to the hearsay rule, 801(d)(2)(E). The short answer to Perkins' contention is that the court, in passing upon the challenge to the Meredith, Jr. testimony, was not obligated to announce on the record the preliminary finding of fact which conditioned the admissibility of the testimony under Fed. R. Evid. 801(d)(2)(F). *See United States* v. *Curro*, 847 F.2d 325, 328 (6th Cir.), *cert. denied*, 109 S.Ct. 116 (1988).

VIII.

TRIAL COURT VOUCHED FOR PROSECUTOR.

All defendants except Scott contend the trial court abused its discretion in failing to grant a mistrial on the basis that the court vouched for the credibility of the prosecution when, in response to a request by counsel for defendant Ware that she be allowed to verify after each day of trial that each exhibit admitted that day was actually received in evidence, the court said it would rely on

the honesty of the prosecutor and denied counsel's request.

"The decision to order a mistrial rests in the trial court's discretion." *Hamm* v. *Jabe*, 706 F.2d 765, 767 (6th Cir. 1983).

During the direct examination of Al Meredith, Sr., the prosecution moved to admit certain documentary evidence. Counsel for one defendant asked permission to examine the documents. It was revealed that not all defense counsel were given a copy of the prosecution's proposed exhibits; instead, the exhibits were delivered to Migdaleck's attorney to circulate among defense counsel. The court required the prosecution to provide each defendant with a copy of all the exhibits. Counsel for defendant Ware then inquired if counsel could, after each day of trial, verify that each admitted exhibit was used.[3] The court said:

> I am going to rely on the United States attorney to be honest. He always has been. He always will be.

Outside the presence of the jury, defendants moved for mistrial asserting the court vouched for the credibility of the prosecution. The court denied the motion.

As the Supreme Court said in *Glasser* v. *United States*, 315 U.S. 60 (1942), *reh. denied*, 315 U.S. 827 (1942):

> Perhaps the court did not attain at all times that thoroughgoing impartiality which is the ideal, but our examination of the record as a whole leads to the conclusion that the *substantial rights of the petitioners were not affected.* The trial was long and the incidents relied on by petitioners few. We must guard against the magnification on appeal of instances which were of little importance in their setting.

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3 Counsel for defendant Ware explained at oral argument that "used" meant "received."

Id. at 83. (Citations omitted; emphasis added.)

This was an isolated comment in a rather lengthy trial and the comment was made during a general discussion regarding the identification and introduction of the prosecution's exhibits. Moreover, the court, in its instructions to the jury, favorably commented upon the professionalism of every attorney. We do not think the cited comment by the trial court denied defendants a fair trial.

We **AFFIRM**.

APPENDIX B

ORDER DENYING MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated December 16, 1993)

(ANDERS MIGDALECK, Petitioner, v. UNITED STATES OF AMERICA, Respondent — Civil No. 93-74964; Related to Crim. No. 88-80012; Hon. Horace W. Gilmore)

This matter is before the Court upon the motion of Petitioner to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255. On July 15, 1988, the jury returned a verdict of guilty and Petitioner was convicted of ten counts of Mail Fraud under 18 U.S.C. § 1341. On September 9, 1988, he was sentenced on Counts III, IV, V, and VI to four consecutive terms of imprisonment of five (5) years each, resulting in a sentence of twenty (20) years duration. He was also sentenced to serve five (5) years each on Counts VII, VIII, IX, XIII, XIV, and XXIII, to run concurrent with each other and to the sentence imposed on Counts III, IV, V, and VI. On March 7, 1990, the Sixth Circuit (Court of Appeals affirmed his conviction.

In this motion, Petitioner attacks his judgment and sentence, claiming he is entitled from relief as a result of the Supreme Court's decision in *Sullivan* v. *Louisiana*, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Specifically, Petitioner argues that this court's jury instruction on accomplice testimony was constitutionally deficient and could have allowed the jury to convict despite its failure to find guilt beyond a reasonable doubt.

In *Sullivan* v. *Louisiana*, *supra*, the United States Supreme Court held that a constitutionally deficient jury instruction in a criminal case as to the definition of reasonable doubt

was not amenable to harmless error analysis on appeal and would always invalidate a conviction. In that case, the court found that the trial court's instructions to the jury included a definition of "reasonable doubt" that was, as the State conceded below, essentially identical to the one held unconstitutional. in *Cage* v. *Louisiana*, 498 U.S. 39 (1990). *Sullivan*, 124 L. Ed. 2d at 187. Accordingly, the Court reversed the decision of the Supreme Court of Louisiana upholding the conviction and remanded the case for further proceedings.

In the instant case, this court instructed the jury as follows:

> The testimony of one who asserts by his testimony that he is an accomplice may be received in evidence and considered by the jury even though not corroborated by other evidence and given such weight as the jury feels it should have. You should always keep in mind, however, that such testimony is always to be viewed with caution and considered with great care. *You should never convict a Defendant upon the unsupported testimony of an alleged accomplice unless you believe that unsupported testimony beyond a reasonable doubt.*

This instruction was requested by another defendant, McQueen, and is based on Devitt and Blackmur [*sic*], *Federal Jury Practice and Instructions*, 3d ed., § 17.06 (1977). In this § 2255 motion, Petitioner contends that the jury instruction was constitutionally deficient and, therefore, not amenable to a harmless error analysis on appeal. Accordingly, Petitioner asserts that fundamental fairness and the Sixth Amendment requires that he be granted a new trial.

As the Supreme Court stated in *In re Winship*, 397 U.S. 358, 364 (1970), the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every

fact necessary to constitute the crime with which he is charged." This Court finds that the jury instructions in the underlying criminal case, taken as a whole, required the jury to find guilt beyond a reasonable doubt as required by the Due Process Clause. As such, this Court concludes that the above-mentioned jury instruction was not constitutionally defective. Thus, the Court rejects Petitioner's argument that he is entitled to relief under *Sullivan*.

In his direct appeal to the Sixth Circuit, Petitioner argued that the trial court erred in failing to properly instruct the jury concerning evaluation of the exculpatory accomplice testimony. The Sixth Circuit determined that this assignment of error did not require a reversal of Petitioner's conviction, reasoning as follows:

> We are presented then with a situation in which [Petitioner] assigns error to the trial court's failure to instruct the jury as to the proper manner in which to evaluate exculpatory accomplice testimony, although no timely and understandable request for such an instruction was made at trial and no objection registered to its omission. Consequently, we review this assignment of error under the plain error rule. Fed. R. Crim. P. 52(b). Where, as here, no specific objection was registered at trial, reversal is required only where a miscarriage of justice would result. We think it manifest that no miscarriage of justice resulted from the court's failure to instruct, sua sponte, on the manner in which the jury might have evaluated the exculpatory accomplice testimony, and defendants cite no authority to the contrary. [cites omitted]

Because the Sixth Circuit has already determined that Petitioner's assignment of error was to be reviewed under the plain error rule and did not result in a miscarriage of justice, this Court concludes that Petitioner is not entitled to relief on this ground.

Therefore, IT IS ORDERED that Petitioner's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 be, and the same hereby is, DENIED.

/s/ HORACE W. GILMORE
United States District Judge

Dated: DEC. 16, 1993
Detroit, Michigan

APPENDIX C

OPINION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

(United States Court of Appeals — Sixth Circuit)

(Filed August 29, 1994)

(ANDERS MIGDALECK, Defendant-Appellant, v. UNITED STATES OF AMERICA, Plaintiff-Appellee — No. 93-2604; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: MARTIN, NELSON, and DAUGHTREY, Circuit Judges.

PER CURIAM.

Claiming that the district court improperly defined "reasonable doubt" in its instructions to the jury with respect to accomplice testimony, Anders Migdaleck filed a motion to vacate sentence under 28 U.S.C. § 2255 and requested a new trial. The district court denied the motion, and Migdaleck now appeals. We affirm.

On January 6, 1988, a federal grand jury returned a twenty-three count indictment charging Migdaleck and eight other individuals with mail fraud and interstate transportation of securities taken by fraud, in violation of 18 U.S.C. §§ 1341 and 2134. Specifically, the indictment contained allegations that Migdaleck and the other defendants engaged in a scheme to defraud insurance companies by intentionally setting fire to residences located in the Detroit metropolitan area. After each fire, a claim was filed by mail with the homeowner's insurance carrier. Migdaleck, a licensed contractor and owner of two construction companies, purportedly organized the arson

scheme and paid the other participants in the scheme out of the insurance proceeds.

At trial, arsonists Willie Weems, Adar Hassan, and Al Meredith, Jr., gave testimony favorable to Migdaleck, stating that the residence fires were represented to Migdaleck as legitimate losses, and implying that Al Meredith, Sr., operated the arson scheme. Al Meredith, Sr., however, testified that Migdaleck was his accomplice in the scheme, paid commissions to the arsonists, and provided the funds used to purchase incendiary materials. Pursuant to the request of one of Migdaleck's codefendants, the district court instructed the jury with respect to accomplice testimony as follows:

> The testimony of one who asserts by his testimony that he is an accomplice may be received in evidence and considered by the jury even though not corroborated by other evidence and given such weight as the jury feels it should have. You should always keep in mind, however, that such testimony is always to be viewed with caution and considered with great care. *You should never convict a Defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt.*

(emphasis added) Migdaleck's trial counsel objected to this instruction, which was based on Devitt and Blackmar, *Federal Jury Practice and Instructions*, 3d ed., § 17.06 (1977), and requested a substitute instruction:

> [I]f you believe the evidence of the accomplice, and you feel that in and of itself is sufficient to satisfy you that it is proof of guilt beyond a reasonable doubt, then you may accept it.

The district court denied this request, and the jury subsequently convicted Migdaleck on ten counts of mail fraud. The district court sentenced him to twenty years in prison and ordered him to pay over $170,000 in fines and restitution.

Migdaleck appealed his convictions to this Court, claiming that the district court erred by failing to give an instruction regarding exculpatory accomplice testimony. For this proposition, Migdaleck relied on *Cool* v. *United States*, 409 U.S. 100 (1972), and *United States* v. *Stulga*, 531 F.2d 1377 (6th Cir. 1976). In *Cool*, a single accomplice testified and offered exculpatory testimony for the defense. Over defense counsel's objection, the district court instructed the jury to consider the accomplice testimony if it found that testimony to be true beyond a reasonable doubt. The Supreme Court reversed, finding that this instruction unconstitutionally decreased the government's burden of proof. *Cool*, 409 U.S. at 102-04. In dicta, the Supreme Court stated in a footnote that it also would have reversed the conviction on the alternate ground that it is confusing and unfair to instruct jurors that they may convict on the basis of accomplice testimony without informing them that they may also acquit on that basis. *Id.* at 103 n.4.

In *Stulga*, two of the several accomplices that testified for the government partially exculpated the defendant. Defense counsel objected to the district court's jury instruction on accomplice testimony, and specifically requested an instruction stating that exculpatory accomplice testimony did not have to be believed beyond a reasonable doubt, or by a preponderance of the evidence. This Court held, on appeal, that the district court's failure to give this instruction was reversible error in light of the abundant exculpatory testimony offered, and the "virtual dearth" of inculpatory testimony. *Stulga*, 531 F.2d at 1380.

In assessing Migdaleck's claims on direct appeal, this Court observed that the objection and instruction originally requested at trial by Migdaleck's counsel did not concern the proper evaluation of exculpatory accomplice testimony, unlike the situation in *Cool* and *Stulga*. Accordingly, this Court reviewed the district court's jury instructions for plain error pursuant to Federal Rule of Criminal Procedure 52(b), and found no such error resulting in a

"miscarriage of justice." *United States* v. *Perkins*, Nos. 88-1953 to 88-1956, 88-2031, 88-2110, 1990 WL 20835, at *3 (6th Cir. Mar. 7, 1990) (citing *United States* v. *Hook*, 781 F.2d 1166, 1172 (6th Cir.) (if no specific objection registered at trial, reversal warranted only where a miscarriage of justice would result), *cert. denied*, 479 U.S. 882 (1986)).

In 1993, the Supreme Court decided *Sullivan* v. *Louisiana*, 113 S.Ct. 2078 (1993). In *Sullivan*, the Supreme Court held that a constitutionally deficient definition of reasonable doubt in a criminal case jury instruction is not amenable to harmless error analysis, and that such a deficient definition would always invalidate a conviction. The jury instruction in *Sullivan* was essentially similar to the one found unconstitutional in *Cage* v. *Louisiana*, 498 U.S. 39 (1990). The *Cage* jury instruction defined reasonable doubt in terms of a "grave" uncertainty, a "substantial" doubt, and "moral certainty."

Following the decision in *Sullivan*, Migdaleck filed a motion to vacate sentence under 28 U.S.C. § 2255 and requested a new trial, claiming that the district court's failure to instruct the jury on exculpatory accomplice testimony resulted in a deficient definition of reasonable doubt. According to Migdaleck, the combined holdings of *Cool*, *Stulga*, and *Sullivan* mandated this conclusion. The district court denied the motion, stating that the jury instruction it gave neither lessened the government's burden of proof nor set forth an incorrect definition of reasonable doubt, and that *Sullivan* therefore did not apply. *See Sullivan*, 113 S.Ct. at 2082 ("the essential connection to a "beyond a reasonable doubt" finding cannot be made *where the instructional error consists of a misdescription of the burden of proof*, which vitiates all the jury's findings") (emphasis added). The district court further held that, under the same plain error analysis previously engaged in by this Court, Migdaleck was not entitled to relief. This timely appeal followed.

Here, Migdaleck reiterates his contention that the district court's jury instruction improperly defined reason-

able doubt under *Cool* and *Stulga*, and that *Sullivan* requires that he be retried as a result. The key part of the instruction in question reads as follows: "You should never convict a Defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt." Based on the jury instructions as a whole, and this portion of them in particular, we conclude that the district court correctly described the government's burden of proof, and that *Sullivan*, which involved a further qualitative, "grave uncertainty"/ "substantial doubt" definition of reasonable doubt, is thus inapplicable to the facts of this case. Accordingly, this Court's previous plain error analysis remains valid, and we do not reach the question of whether *Sullivan* has retroactive effect.

For the foregoing reasons, the judgment of the district court is affirmed.